

BRENT HANSEN, ET AL.

IBLA 91-269, 91-270

Decided November 4, 1993

Appeals from decisions by the Utah State Office, Bureau of Land Management, denying protests against an exchange of public for private land. UTU 61935.

Affirmed.

1. Appraisals: Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--National Environmental Policy Act of 1969: Generally

A protest against an exchange of public and private land was properly denied when it was not shown that the proposal was contrary to valuation requirements imposed by FLPMA sec. 206 and applicable regulations, or that it violated operative land-use plans, or that the exchange was contrary to the public interest. The fact that the exchange resolved a trespass did not establish that it was contrary to public policy.

APPEARANCES: Brent Hansen, Vernal, Utah, pro se; Will Durant, President, Uintah Mountain Club, Vernal, Utah; David K. Grayson, Esq., Office of the Solicitor, Intermountain Region, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Brent Hansen and the Uintah Mountain Club have appealed from separate decisions issued on April 4, 1991, by the Utah State Office, Bureau of Land Management (BLM), that denied their protests against an exchange of public land approved by a decision record/finding of no significant impact issued by the Vernal District Manager in exchange number UTU 61935. The District Manager's decision, issued on September 19, 1990, found the proposed exchange conformed to the Ashley-Duchesne Management Framework Plan (MFP), and determined that the "result of the exchange would be five * * * additional acres of public land including critical deer winter range, additional 211 feet of Spring Creek, and its associated riparian habitat, and better public access to Red Mountain."

A notice of realty action (NORA) was published in the Federal Register on November 1, 1990 (55 FR 46106), proposing to exchange 5 acres of public land in tract 37, sec. 20, T. 3 S., R 21 E., Salt Lake meridian, Utah, for ten acres of private land, 5 acres of which was described as the SE $\frac{1}{4}$ SE $\frac{1}{4}$

NW¼ of the same sec. 20 as the public land to be exchanged. Reserving the mineral rights to the land exchanged, the NORA explained that:

The purpose of the exchange is to acquire non-Federal lands to facilitate recreation management and access to the Red Mountain Recreation Complex. The exchange will also resolve an unauthorized use of public lands by the exchange proponent. The exchange is consistent with the Bureau's planning for the lands involved. The values of the lands to be exchanged are equal.

The exchange was proposed pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1716 (1988).

Hansen challenges the sufficiency of the NORA for the exchange because the environmental assessment (EA) was inadequate. Additionally, he questions the appraised valuation of the lands, the propriety of making an exchange to resolve a trespass, and the advisability of exchanging the selected Federal lands.

Departmental regulation 43 CFR 4.410(a) confers the right to appeal upon "[a]ny party to a case who is adversely affected by a decision" of a BLM officer. A person filing an appeal from a BLM decision must be both a party to the case and adversely affected by that decision. See Mark S. Altman, 93 IBLA 265, 266 (1986), and cases cited. Although an individual may become a party to a case by virtue of filing of a protest to a proposed action by BLM and a timely appeal of the denial of that protest, that fact alone does not necessarily establish that one has been adversely affected by the decision under appeal. An unsuccessful protestant must still demonstrate that he has a legally recognizable interest that has been adversely affected by the denial of the protest. A deep concern about the issues does not suffice. The Board will not speculate why an appellant is concerned about a decision; rather the appellant must allege or the record must show an interest that has been injured. Id. While his protest made him a party, Hansen has not alleged or demonstrated that he has a recognizable interest that was adversely affected by BLM's dismissal of his protest. His failure to establish that he has any direct stake in BLM's approval of this land exchange requires that his appeal (IBLA 91-269) be dismissed for lack of standing.

The Uintah Mountain Club grounds its appeal (IBLA 91-270) on the argument that the exchange is contrary to a proposal made by the Club concern-ing a proposed area of critical environmental concern (ACEC) that includes the land at issue. Alleging that Club members regularly use the public land affected by the exchange, the Club further argues that the EA on which the decision to make the exchange is based is faulty, that the public will not receive equal value by the exchange, that the action is contrary to the Ashley Creek Management Framework Plan, and that approval of an exchange to resolve a trespass encourages trespass. We find that the Club (as a protestant whose objections were denied and as a user of the public lands affected, and as a participant in planning and the proponent of plans for

future classification of the area in which the exchange is planned) is a party to this appeal shown to be affected by the action so as to confer standing to appeal. See generally, Scott Burnham, 100 IBLA 94, 94 I.D.

429 (1987). Accordingly, the merits of the contentions raised by the Club will be considered.

[1] The Club argues that the EA relied upon by BLM in support of the decision to make the proposed exchange is flawed, and that comparison of an earlier draft of the EA reveals a fundamental error in the agency analysis of the proposed action. Relying on the earliest draft of three forms of EA referred to, the Club explains that the "original" EA was premised on the notion that "the resource values of the private lands proposed for exchange must be significantly higher than the resource values of the selected public lands" (Statement of reasons (SOR) at 3, (the SOR is not numbered: numbers are supplied for convenience of reference)). Relying on the correctness of this proposition, the Club engages in a detailed analysis of the relative merits of the lands at issue in the exchange, considering "wildlife values" and "recreational/scenic resources" involved. The analysis so made is flawed, however, because it relies on an incorrect legal foundation. FLPMA, section 206, as amended, provides pertinently that "values of the lands exchanged * * * either shall be equal, or if they are not equal, the values shall be equalized by the payment of money * * * so long as payment does not exceed 25 per centum of the total value." 43 U.S.C. § 1716(b) (1988). This requirement is mirrored in Departmental regulations governing valuation of exchange lands. See 43 CFR 2201.3(a) and 2201.5(c)(2). The reason that earlier drafts of the EA embodying different concepts of valuation for exchange purposes were not used, therefore, is not that they failed to reach a preconceived result, as the Club contends, but because they were legally incorrect. The final revision of the EA, upon which BLM based the decision to proceed with the exchange, is based on the correct legal standard for determining valuation in conformity to Departmental regulations cited above.

To determine whether the lands at issue were of equal value so as to meet the legal standards for exchange valuation, BLM prepared a staff appraisal comparing the two tracts. A written appraisal dated October 17, 1990, appears as part of the case file, and concludes that "the offered and selected properties are equivalent in value." While the Club disputes this finding, arguing at pages 5, 6, and 7 of the SOR that the exchanged private lands are "inferior" to the public land, no appraisal has been offered to rebut the conclusions reached by the BLM realty appraiser, nor has the Club attempted to show error in the October 1990 appraisal relied upon by BLM. This failure to make an affirmative showing concerning value condemns the Club's argument on this issue. See Seven Star Ranch, Inc., 78 IBLA 366, 368 (1991).

It is argued, at page 6 of the SOR, that the exchange is "not in accordance with the existing Ashley Creek Management Framework Plan" because the existence of a cabin on the exchanged land is in derogation of the proposed Red Mountain ACEC. Nonetheless, BLM found that the proposal was "in

conformance with the Ashley-Duchesne Management Framework Plan" based on analysis appearing at page 3 of the EA (not numbered in the case file: pagination supplied). The EA explains:

The Ashley Creek MFP proposed the Red Mountain Area as an Area of Critical Environmental Concern (ACEC). The cabin is located within this proposed ACEC. The Ashley Creek MFP states the proposed ACEC was not approved but determined the area would be managed to provide protection and enhancement for: semi-primitive qualities, crucial big game winter range, visual qualities, vegetation diversity and archaeological values.

The general area consists of federal, state and private lands. Some of the adjacent private land is being used for homesites. There is some dispersed recreation which occurs on public and private lands in the vicinity. There are no mining claims on either the offered or selected lands.

Although the Club has challenged these findings, it has not shown that the factual foundation for the conclusion reached is in error, but argues instead that, despite the fact that the ACEC has not yet been approved, the better course of action would be to require removal of the trespass cabin.

Nonetheless, the Ashley MFP does not forbid land exchanges with private owners. It was amended in 1987 to provide that such actions could take place within the area covered by the Ashley Creek MFP. See MFP Amendment dated September 24, 1987, at 1-4 and Maps 1 and 4. The arguments raised by the Club do not establish error in the BLM decision under review, but simply restate some of the objections concerning future uses of the land that were made and considered by BLM during planning for the exchange. While it is the duty of BLM, when acting pursuant to the authority conferred by 43 U.S.C. § 1716 (1988), to correctly evaluate all the planning factors affecting the public interest that go into a decision involving exchange of public for private lands, the Club has not shown, as it must do if it is to prevail, that there was any error in the decision to apply the amended MFP (that permitted exchanges of land within the affected area) to the proposed exchange. See John S. Peck, 114 IBLA 393, 396-7 (1990), and cases cited. We find that BLM correctly applied the amended MFP in this instance.

Finally, the Club argues that approval of the exchange is an implicit encouragement of trespass (since the exchange resolves, in part, a problem posed by a trespass cabin built on public land) and should not be allowed as a matter of policy. The EA acknowledged that this aspect of the exchange had excited "emotional concerns * * * related to the ethics of the cabin being built on public land" (EA at 14), and it was therefore considered by the decision maker before approval was given for the exchange. Nonetheless, on appeal the Club has pointed to a number of factors from which it is concluded that the exchange proponent could not have "made a reasonable mis-take in selecting [the trespass] site for construction" (SOR at 5). It

is urged that the fact the site for the cabin "errs in more than one direction" establishes a lack of good faith which, when coupled with the failure to obtain a prior survey of the construction site, establishes a degree of "carelessness [that] is not acceptable among private landholders." Id.

A similar argument in a similar case was rejected by the opinion in Foust v. Lujan, 942 F.2d 712, 717 (10th Cir. 1991) when the court found that, although improvements had been constructed in trespass on public lands at a site that deviated in two directions from the private landowner's holding, nonetheless "it is too much to expect every purchaser to resurvey." The standard of care that the Club seeks to impose on the cabin builder to bar his application for exchange in this case has not, therefore, been approved by the United States Court of Appeals for the locality where the exchange is located. Instead, as the opinion cited indicates, such matters must be decided case-by-case. On the record before us we cannot find that the fact there was a trespass which was resolved by exchange was contrary to Departmental policy regarding exchanges of land. In this case a number of other factors described in the NORA and EA were considered by BLM to justify the exchange. The Club has not shown that this conclusion was made in error, or that the transfer was not in the interest of the United States. See Barrett S. Duff, 122 IBLA 244, 249 (1992). Inasmuch as there has been no showing that the exchange is contrary to law, or not in the public interest, or that BLM committed an error in implementing the exchange, the decision to deny the Club's protest must be affirmed.

To the extent not specifically addressed herein, other arguments raised by the Club on appeal have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from by the Uintah Mountain Club is affirmed, and the appeal by Brent Hansen is dismissed for lack of standing to appeal.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge